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No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A/ KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER ON THE APPLICABILITY OF FEDERAL LAW

RICHARD K. HINES, V
TAYLOR TAPLEY DALY
NELSON MULLINS RILEY & SCARBOROUGH LLP
First Union Plaza, Suite 1400
999 Peachtree Street, NE
Atlanta, GA 30309
(404) 817-6000

R. BRUCE RIDER
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 629-2877

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
EAMON P. JOYCE
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

HYMAN HILLENBRAND
DEORCHIS, HILLENBRAND & WIENER, LLP
2650 Biscayne Boulevard
Miami FL, 33137
(305) 571-9200

Counsel for Petitioner

October 4, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

Does federal or state substantive law govern the questions presented?

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SUPPLEMENTAL BRIEF

Federal law governs both questions presented. The first question is whether a contract for the transnational transportation of goods by sea into the United States entered into by a forwarder-carrier with the vessel carrier binds the cargo owner. The obligations created by maritime bills of lading have long been governed by federal maritime law, not state law. Moreover, both the Carriage of Goods By Sea Act (COGSA) and the Shipping Act compel the application of federal law. Finally, the parties litigated and the courts below decided this issue under federal law. Federal law likewise governs the second question presented, which concerns the application of the rule of *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). The interpretation of a Himalaya Clause in a maritime bill of lading is a question of federal maritime law; the court of appeals expressly decided the question as a matter of federal law; and the parties litigated the issue as such. Application of the law of 50 states to these questions would destroy the necessary uniformity in the law governing maritime contracts of carriage.

1. A contract for carriage of goods by sea between a foreign country and the United States is a maritime contract, *Armour & Co.* v. *Ft. Morgan S.S. Co.*, 270 U.S. 253, 259 (1926); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866); *Morewood v. Enequist*, 64 U.S. (23 How.) 491, 493 (1859), and is governed by maritime law. *Workman* v. *New York City*, 179 U.S. 552, 562 (1900). As this Court explained, federal maritime law is "'a system of law coextensive with, and operating uniformly in, the whole country,'" and it is contrary to the constitutional scheme "'to place the rules and limits of maritime law under the disposal and regulation of the several states.'" *Id.* at 561-62. Thus, "a maritime contract executed in New York [i]s held to be an American contract," and is governed by federal and not state law. *Id.* at 562; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U.S.

397, 458 (1889) (federal maritime law governed "the nature, the obligation and the interpretation" of the bill of lading)).

Accordingly, federal maritime law determines the obligations of maritime contracts. That includes special rules of implied agency in contracting that arise "from considerations of the convenience and necessities of the commercial world," regardless of principles of common-law agency. *Thomas* v. *Osborn*, 60 U.S. (19 How.) 22, 30 (1856) (shipowner is bound under maritime law to the extent of his interest in the vessel by contracts of affreightment and certain necessary contracts for supplies and repairs of a ship master who is not his agent "upon the principle that the general owner must be presumed to consent, when he lets the vessel, that the master may make such contracts"); *The Schooner Freeman*, 59 U.S. (18 How.) 182, 189-90 (1855); *The Aurora*, 14 U.S. (1 Wheat) 96, 102 (1816) (Even if not an agent for other matters, "[t]he master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world.").

In *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848), this Court applied federal rules of agency to determine the rights of a cargo owner under a maritime contract of carriage. It held that a contract of carriage was maritime in nature, *id.* at 392, and that a vessel carrier's contract with a nonvessel carrier "was, in contemplation of law, a contract" between the vessel carrier and the cargo owner. *Id.* at 380. This is because the nonvessel carrier is "*considered in law the agent or servant of the owner*, and the possession of the agent is the possession of the owner." *Id.* (emphasis added). "[C]ourts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the

common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade." *4,885 Bags of Linseed*, 66 U.S. (1 Black) 108, 114 (1861).[1]

The applicability of substantive maritime law does not depend upon the admiralty jurisdiction of the federal courts, but arises from the nature of the maritime contract. See *Watts* v. *Camors*, 115 U.S. 353, 362 (1885) (rejecting application of state contract law to an ocean charter-party because the parties "must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed"); *Union Fish Co.* v. *Erickson*, 248 U.S. 308, 313 (1919) (rejecting application of state law to a maritime service contract because "[t]he maritime law controlled" and "the parties must be presumed to have had in contemplation the system of maritime law under which it was made"). A contract for carriage of goods by sea is the quintessential maritime contract. It does not fall within the limited category of contracts that are "'maritime and local,' in the sense that the application of state law would not disturb the uniformity of maritime law." *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 738 (1961) (citation omitted). That exception only applies to contracts with, at a minimum, "no direct relation to navigation." *Grant Smith-Porter Ship Co.* v.

[1] Indeed, there are many specialized principles of maritime law where the rights and obligations of cargo owners are determined by the contract of affreightment, regardless of who contracts for the shipment. *See, e.g., E.J. Dupont de Nemours & Co.* v. *Vance*, 60 U.S. (19 How.) 162, 169, 170 (1856) (noting that "the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law"); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 450 (1869) ("the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfillment of their contract the cargo is pledged to the ship"); *Ralli* v. *Troop*, 157 U.S. 386, 397 (1895) (the jettisoning of cargo for the safety of the ship is done by "'the captain as agent, not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo'").

Rohde, 257 U.S. 469, 477 (1922); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 314-21 (1955) (applying local law to marine insurance contract executed in a state given pervasiveness of state insurance regulation, and absence of any rule of maritime law); *Kossick*, 365 U.S. at 742 (discussing *Wilburn*).

The uniform and predictable application of maritime law is essential to the commercial reliance on bills of lading. As leading scholars have observed, the terms of bills of lading are "fixed by institutional practice and locked firm in printed forms," and "the fact that judicial interpretations have accreted around these set clauses and phrases tends in turn to make doubly sure their continued use, for the maritime world grows to rely on continuance in settled interpretations, and to stabilize its documentary practice on that reliance." G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 1-6, at 15-16 (2d ed. 1975). The laws of the 50 states cannot apply to the question of whether direct privity of contract is required in order for a vessel carrier's bill of lading to be enforced against the cargo owner: "the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States." *Union Fish*, 248 U.S. at 314; *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964) (noting specialized contract liability rules under federal maritime law); *Herd*, 359 U.S. at 301 (COGSA enacted to promote uniformity in bills of lading).

Nothing in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938) affects this analysis. *Erie* does not speak to, much less change, the rule that substantive maritime law is not displaced or altered by state law. *Wilburn*, 348 U.S. at 314 ("States can no more override such judicial rules validly fashioned than they can override Acts of Congress"); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 222-23 (1986); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-46 (1942). Thus, maritime law, where applicable, governs even when (as here) the plaintiffs invoke the diversity jurisdiction of the federal

court, and not its admiralty jurisdiction. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 411 (1953); *Kossick*, 365 U.S. at 731, 738-40; 1 T. Schoenbaum, *Admiralty and Maritime Law* § 5-1, at 179-80 & n.5 (4th ed. 2004).[2]

Indeed, state law has no operation even as to bills of lading executed within a state for transportation to other states or foreign countries; those provisions have long been exclusively governed by federal law. *Cincinnati, New Orleans, & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-27 (1916); *Missouri Pac. R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 137 (1964); *Herd*, 359 U.S. at 308; 49 U.S.C. § 80102 (Bill of Lading Act). Although the Bill of Lading Act does not address bills issued in foreign lands for transport *into* the United States, there is no conceivable basis for applying state law to maritime bills of lading executed abroad. Such bills "are governed by the general maritime law, considering relevant choice of law rules" as between foreign and federal maritime law. 1 Schoenbaum, *supra*, § 10-11, at 622. Here, the court of appeals applied federal law, and respondents never raised any claim that foreign law governed or conflicted with the federal rule that a cargo owner is bound by the contracts made for shipment of his goods by a forwarder-carrier. In any event, federal law necessarily provides the rule of decision here.

2. Even if there were a valid argument that state or foreign law would apply and support a different rule, COGSA and the Shipping Act compel the rule advocated by petitioner as a matter of federal law. COGSA is wholly nullified if the vessel carrier's contract of carriage in its bill of lading cannot

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[2] Plaintiff's claim for breach of contract is within the admiralty jurisdiction of the federal court, even though the complaint only expressly claimed diversity jurisdiction. JA 30-31, 37-38. Furthermore, this Court has rightly held that a provision of a bill of lading may not be defeated by the expedient of pleading one's claim in tort. *The Queen of the Pac.*, 180 U.S. 49, 53 (1901); *see Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Ltd.*, 235 F.3d 53, 60 (2d Cir. 2000).

be enforced against the cargo owner. Pet. Br. 36-37; Reply Br. 4-5. COGSA only applies to "*contracts for carriage* of goods by sea to or from ports of the United States" manifest in bills of lading. 46 U.S.C. app. § 1312 (emphasis added); see also *id.* §§ 1300, 1302. It only "regulates the terms of ocean carriage by the indirect but highly efficacious device" of imposing statutory mandates as "compulsory terms" in the ocean carrier's bill of lading. Gilmore & Black, *supra*, § 3-25, at 145, § 3-38, at 172; 1 Schoenbaum, *supra*, § 10-15, at 650. Because COGSA only regulates contracts of carriage in bills of lading, both its mandatory and permissive provisions – including but not limited to its liability limitations – cannot be invoked against the cargo owner (the real party-in-interest) if the owner is not bound by the vessel carrier's bill of lading. Although respondents constantly emphasize that here a railroad is invoking the vessel carrier's bill, their proposed rule would prevent a vessel carrier from invoking the COGSA liability limit or other defenses against any claim of the cargo owner for losses at sea or on land. Thus, under respondents' rule, COGSA would have no effect because a cargo owner that uses a forwarder-carrier to contract with the vessel carrier could always evade COGSA by suing the vessel carrier directly. Federal law prohibits respondents' proposed rule because it nullifies COGSA. *Vimar Seguros y Reaseguros, S.A.* v. *M/V SKY REEFER*, 515 U.S. 528, 540-41 (1995); *Knott* v. *Botany Mills*, 179 U.S. 69, 77 (1900) (refusing to apply foreign law that would conflict with the Harter Act, the statutory precursor to COGSA); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("To the federal statute and policy, conflicting state law and policy must yield.").

Moreover, federal law governs here because the Shipping Act itself directly provides the rule of decision. A nonvessel-operating common carrier (NVOCC) such as ICC Ltd. in this case is expressly defined by the 1984 Shipping Act to be "a shipper in its relationship with an ocean common carrier." 46

U.S.C. app. § 1702(17)(B). Under longstanding federal law, a forwarder-carrier that contracts as a shipper with a transportation carrier acts as the agent for the cargo owner, its "undisclosed principal," and the owner is bound by the liability limitations accepted by the forwarder-carrier. *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 488 n.27 (1949); *Great N. Ry.* v. *O'Connor*, 232 U.S. 508, 514 (1914); Pet. Br. 25-30; Reply Br. 7-8. Moreover, any contrary rule would violate the antidiscrimination mandate of the Shipping Act and the filed rate doctrine. Reply Br. at 12 & n.7. Federal law governs, and compels reversal on the first question presented.[3]

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[3] Even if there were an arguable basis for foreign maritime law to apply, which there is not, no party raised or demonstrated a different rule of foreign law below, and the district court and court of appeals decided the issue based on their understandings of the federal rule recognized by this Court in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), Pet. App. 7a, 37a. It is appropriate for federal courts to apply federal maritime law (the law of the forum regarding maritime bills of lading) when no party proves or raises an issue of foreign law. *Liverpool*, 129 U.S. at 444-46; Fed. R. Civ. P. 44.1 (a party seeking to invoke foreign law must give "reasonable written notice" of its intention to do so); *Restatement (Second) Conflict of Laws* § 136, cmt. h (1971) ("[w]hen both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum," and apply forum law); *Aceros Prefabricados, S.A.* v. *TradeArbed, Inc.*, 282 F.3d 92, 97 n.4 (2d Cir. 2002) ("The parties' briefs assume that New York substantive law governs the issues ... presented here, and such 'implied consent ... is sufficient to establish choice of law.'") (second omission in original); *American Fuel Corp.* v. *Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (same). In any event, if conflicts-of-law analysis had been undertaken, federal law would have been the proper choice. While it is generally presumed that the law of the place of issuance governs, that rule does not apply if the "the parties at the time of making it have some other law in view," *Liverpool*, 129 U.S. at 458; *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825), or if another jurisdiction has more significant interests in applying its law to the issue at hand, *Restatement* § 197. Here, the parties looked to federal law, making COGSA the default law governing the contract, JA 61 ("In the absence of compulsorily applicable legislation, COGSA shall govern."), and the

3. The second question presented of whether the *Herd* rule of strict construction may be invoked to deny the coverage of the ICC Himalaya Clause to Norfolk Southern is also plainly governed by federal law. *Herd* is a rule of federal law, 359 U.S. at 305-08 (applying federal "common law as declared by this Court" to Himalaya clause of ocean bill of lading for foreign transport), and the Eleventh Circuit was explicit that it was announcing a rule of federal law: "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a.

Moreover, just like the Hamburg Süd bill, the ICC bill of lading is a maritime contract executed abroad and governed by maritime law, and there is not even a colorable basis for application of any state's law, for all the reasons stated *supra* at 1-5. The ICC bill of lading likewise does not cease to be a maritime contract simply because the contract of carriage provides not just for ocean carriage but for door-to-door transportation from a foreign contrary to an inland destination in the United States, as the Shipping Act and COGSA encourage. Pet. Br. 3-4. Significantly, the Himalaya Clause at issue (Clause 10.1) applies to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract" at any stage of transportation. JA 94, and thus applies to maritime service providers (such as stevedores) as well as inland service providers.[4] The applicable law governing construction of a

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United States has the principal interest in the resolution of this issue, given the pervasive regulation of carrier liability by COGSA, the Harter Act, and the Shipping Act. *Restatement* § 197 & cmt. a ("the majority of claims in contract for damage to goods during interstate transportation or during international transportation to or from the United States by land, sea or air are governed by treaty or by federal law"); Gilmore & Black, *supra*, § 3-19 at 130. This Court should correct the Eleventh Circuit's erroneous interpretation of federal law.

[4] Respondents can hardly gainsay that this is a maritime contract, for they (erroneously) claim that the ICC Himalaya Clause only applies to maritime providers.

clause in a bill of lading does not vary depending on whether it is invoked by a maritime or inland service provider.

Furthermore, although COGSA does not by compulsory force apply to a carrier's servants, agents, or other service providers or beyond the tackle-to-tackle period, see *Herd*, 359 U.S. at 301-02, COGSA nonetheless affirmatively permits carriers to extend the COGSA limitations by contract. 46 U.S.C. app. § 1307. As the Fourth Circuit has held,

> By subjecting all foreign bills of lading to COGSA, Congress afforded to international shippers and carriers a greater degree of certainty and uniformity in their dealings. And, by permitting those parties to contractually extend application of COGSA to the periods prior to loading and after unloading but before delivery, Congress authorized shippers and carriers to place all of their dealings under COGSA, if they so intend. To hold that this contractual extension of COGSA, to which both shipper and carrier have agreed, may be measured against the state law of the port in which the cargo may be damaged could undercut these protections and would offer to sellers and shippers the benefit of additional legal theories and remedies for which they had not bargained.

Wemhoener Pressen v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993). Moreover, "the contract of carriage embodied by the bill represents the parties' intentions at the time the contract was made. So long as it remains in effect, it should be interpreted according to its terms and without reference to the varying state laws of this nation's many ports." *Id.* at 740-41; *accord Union Fish*, 248 U.S. at 313 (parties to a maritime contract deemed to look to maritime law as controlling the interpretation of the contract).

Accordingly, "the rights and obligations of third party beneficiaries under a Himalaya clause should be determined with reference to the bill of lading, not state law, even if state

law is inconsistent," and therefore the contract should be interpreted according to federal law. *Wemhoener*, 5 F.3d at 740.[5] State law does not apply to foreign bills of lading for transportation of goods into the United States.[6] The Eleventh Circuit erred in its application of *Herd*, see *Calderon* v. *Atlas S.S. Co.*, 170 U.S. 272, 280 (1898) (liability limitation clauses must be given their plain meaning before rules of construction are applied), but it was correct to apply federal law.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

RICHARD K. HINES, V
TAYLOR TAPLEY DALY
NELSON MULLINS RILEY & SCARBOROUGH LLP
First Union Plaza, Suite 1400
999 Peachtree Street, NE
Atlanta, GA 30309
(404) 817-6000

R. BRUCE RIDER
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 629-2877

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
EAMON P. JOYCE
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

HYMAN HILLENBRAND
DEORCHIS, HILLENBRAND & WIENER, LLP
2650 Biscayne Boulevard
Miami FL, 33137
(305) 571-9200

Counsel for Petitioner

October 4, 2004

* Counsel of Record

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[5] The Fourth Circuit incorrectly supposed that the Second Circuit stated a contrary rule in *Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313 (2d Cir. 1983). *See Wemhoener*, 5 F.3d at 741. *Colgate* did not involve a carrier's bill of lading or a Himalaya Clause, but instead a storage contract where a terminal operator incorporated the terms of a carrier's bill of lading (including COGSA liability limitations) into its dock receipts when it accepted cargo for later loading onto a ship. In that context, the Second Circuit held that the validity of the terminal operator's incorporation of COGSA liability limits into a storage contract was governed by state law. 724 F.2d at 315.

[6] On this question as well, neither party invoked foreign law as governing the interpretation of the Himalaya Clause or as conflicting with federal law, and the parties throughout (like the Eleventh Circuit) treated the question presented as an issue of federal law governed by *Herd*. U.S. Cert. Br. 13. Indeed, respondents secured interlocutory review in the Eleventh Circuit on the basis of a circuit conflict on the proper rule of federal law to apply. Pet. 23a; Pet. App. 24a. In any event, respondents concede that Australian and federal law adopt the same principles of the general maritime law on this issue. Resp. Cert. Supp. Br. 10. Finally, even if this Court were to conclude that federal law does not apply, it still must reverse the judgment below, because the Eleventh Circuit based its ruling solely on federal law.